Case No. 3996

In the

United States Circuit Court of Appeals

For the Ninth Circuit

C. L. BOSS, Appellant,

vs.

THE UNITED STATES OF AMERICA, BOSS & PEAKE AUTOMOBILE COMPANY, a corporation, and E. W. A. PEAKE,

Appellees

Brief of Appellant

Upon Appeal from the United States District Court for the District of Oregon

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AUTHORITIES

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STATEMENT

The United States, as plaintiff, instituted suit to recover $6,202.65, with interest and penalties, from Boss & Peake Automobile Company, a corporation, C. L. Boss and E. W. A. Peake, claiming such sum under the income tax law passed in 1917

as excess profit for the period from January 1, 1917, to June 1, 1917, during which the Boss & Peake Automobile Company was carrying out its corporate powers.

Appellee Boss filed pleadings admitting the amount of the government claim but contending that as between him and Mr. Peake that Peake should pay such sum because Boss had paid an equal sum and the unpaid balance was fifty per cent of the whole tax levied by the government.

The admitted facts are that the net assessable tax was $12,405.30, of which Boss paid one-half. The real question in controversy is whether Mr. Boss or Mr. Peake shall pay the remainder.

The lower court (Judge Wolverton) filed a written opinion reported in,

> United States v. Boss & Peake Automobile Co., et al., 285 Fed. 410 to 420,

which, though evincing care in preparation and intended fairness of expression, yet contains the errors of fact and resulting conclusions which will hereinafter be pointed out.

The opinion so filed was the basis of the decree from which this appeal is prosecuted (Tr. p. 57).

In addition to the foregoing the facts are briefly these:

The Boss & Peake Automobile Company was organized and incorporated on November 8, 1916, with a capital stock of $30,000, divided into 300 shares, of $100 each. Of these shares Boss subscribed 149, Peake 149, and W. H. Bietau 2. Subsequently Bietau assigned one of her shares to R. E. Murphy. Bietau was the secretary of Peake, and Murphy became the bookkeeper for the corporation. These two were, however, mere holding stockholders, for giving voice at the meetings of stockholders and directors; the real ownership being in Boss, 1 share, and Peake, 1 share. In reality, Boss and Peake were equal owners of the capital stock; each owning 150 shares, and each having paid into the concern as capital investment the full par value of his stock.

The corporation at once entered upon the business for which it was organized, and so continued to June 1, 1917, when, its assets were taken over by C. L. Boss Automobile Company.

About May 21, 1917, Mr. McCornack, representative of the Hudson Motor Car Company, visited Portland, and, having ascertained that contention existed between Boss and Peake in their corporate affairs, expressed preference for Boss to represent their company as between Boss and Peake. This pronouncement was made at the Union Depot in

Portland, Oregon, by Mr. McCornack personally to Mr. Peake personally in the presence of Mr. Boss and Mr. McRell immediately prior to Mr. McCornack's departure for the east. Immediately thereafter a discussion was had between Boss and Peake at the Union Depot at Portland, Oregon, from which this controversy arose. Boss claims that at the discussion it was agreed that there should be a dissolution of the Boss & Peake Automobile Company and a distribution of its assets whereby he and Peake agreed upon an approximate equal division satisfactory to both, and that he, Boss, immediately accepted Peake's proposition. Boss is corroborated by Mr. McRell but Peake's version of the affair is that he simply sold his stock in the Boss & Peake Automobile Company to Boss.

The character of this transaction is determinative of this controversy.

At that time the income tax relation of corporations to the Government was under the law of 1916 and the war income tax of October, 1917, had not been enacted but when enacted in the latter part of 1917 was made retroactive to January 1, 1917.

The conversation at the depot was May 21st or 22nd, 1917, Thereafter, on May 31st, Mr. Peake, in order to carry out the agreement made at the depot, executed numerous documents hereafter referred to

and the transaction between him and Boss was actually closed at the First National Bank of Portland on June 1st, 1917, when Boss paid Peake $26,-137.15 as per agreement and received from Peake the various documents which Peake had signed on May 31st.

Immediately thereafter and on June 1st, 1917, Boss and McRell repaired to the office of Mr. Logan—Boss' attorney—where an affidavit of assumed partnership name under the laws of the State of Oregon was signed and verified and at once filed of record with the proper recording authorities of the County of Multnomah.

Mr. Boss and Mr. McRell claimed, as above stated, that the agreement between Boss and Peake was for dissolution of the Boss and Peake Automobile Company and distribution of its assets and that Peake knew of the then pending formation of a partnership between Boss and McRell and aided in the dissolution and distribution by hastening the culmination of the transaction. Peake denies this, but on this point the court says:

(285 Fed. 416);

> "Peake may have known, and must have known, that Boss and McRell intended forming a copartnership and taking over the assets of the corporation; but in this he was not concerned."

Shortly after the culmination of the transaction on June 1, 1917, the Boss & Peake Automobile Company was actually dissolved and at the time of the passage of the Act of October, 1917, by Congress, the corporation had been out of existence several months.

The Appellee Boss claims that because the transaction between him and Peake was made for the purpose of and was in effect a dissolution of the corporation and a distribution of its assets, that Peake should pay the remaining one-half of the unpaid tax so levied as Boss has already paid one-half thereof.

By the opinion and decree appellee Boss was condemned to pay the balance of said tax, Peake was absolved from liability and thereby the Government was directed to recover its full tax from Boss.

I.

ERRONEOUS STATEMENT IN JUDGE WOLVERTON'S OPINION

Appellee respectfully submits that the record supports his contention that Judge Wolverton erroneously stated in his published opinion:

1. (285 Fed. 412) "On or about May 21, 1917, Boss and Peake had an understanding

between them, *by which Peake was to dispose of his interest in the corporation to Boss.*"

The nature of the transaction, as we shall hereafter show, was in sharp controversy between Boss and Peake; the transaction by which Peake retired from the business is claimed by Boss to have been an agreement for dissolution of the corporation and distribution of its assets, whereas Peake claimed that he simply sold his corporate stock.

We shall discuss this phase of the controversy later.

2. (285 Fed. 413, Judge Wolverton said): "Boss further explains that, before meeting at the depot, the record was brought up, and showed a little over $22,000 profit, and that, after deducting the *profit and loss on accounts unsettled,* would leave approximately $20,000, one-half of which, namely, $10,000, would be Peake's share of the net profits," etc. (italics ours).

The lower court correctly explained that the $20,000 profit remained after—"deducting the profit and loss on accounts unsettled"—but throughout his opinion he seemingly failed to correctly understand this item.

As instance, at 285 Fed. 415 he says:

"The evidence shows that a balance of $1, 373.32 was passed to surplus account."

And again at 285 Fed. 415 he says:

"As to the item of $22,746.64, representing the profits of the corporation, Mr. Boss says it was 'divided and held in abeyance to find out how much interest McRell would take in the business,' and as to the surplus of $1,373.32, he says it was 'credited to ourselves (meaning himself and McRell), because ourselves would absorb in the going business according to our percentages.' He had reference to the percentages of capital each was to have in the co-partnership. Boss further testfies that Peake had nothing to do with the business of the new company after he sold out, 'after he took his distribution.' Peake testifies that he never requested that the corporation be dissolved, and had nothing to do with the organization of the C. L. Boss Automobile Company, and never had any interest in it."

This item of $1,373.32, was, as we submit, misunderstood by the trial court, as a reading of his opinion at 285 Fed. pp. 415-6-7 will disclose. This $1,373.32 item is one-half of $2,746.64, which was not distributed but was,

DEDUCTED PROFIT AND LOSS ON ACCOUNTS UNSETTLED

We quote from Boss' testimony (pages refer to top paging of printed transcript) Boss says on

cross-examination by Mr. Reilly (pp. 186-187, et seq):

"Q. Now, as a matter of fact, Mr. Boss, what was the value of the assets of the corporation on May 31st? Take whatever books you want, and tell us that. What book do you want?

A. I want all of them.

Q. All right.

A. Not counting the salaries, the books show a profit of $52,746.64, of which $2,746.64 was estimated current bills, service on automobiles, profit and loss on endorsements, the business liabilities of that present day, leaving the net profit after that statement of $50,000—not net profit; net in the business.

Court: What are those figures you gave there?

A. As profit?

Court: Yes.

A. The profit was $20,000.

Court: I know; but you gave figures there fifty thousand.

A. No, the amount in the business. As I understood, the amount in the business.

Mr. Reilly: The assets in the business. He said profits, but he meant assets.

A. Yes, if I said profits I meant assets.

Court: What is that asset?

A. $52,746.64, of which $2,746.64 was current liabilities.

Court: Yes, I understood that.

Q. Your profit and loss account in your ledger shows a profit of $22,746.64? Is that right?

A. Yes, sir.

* * *

A. That is what I said, without counting salaries here when I made the statement.

* * *

Q. The profit shown on your books at that time was $22,746.64?

A. Not taking into consideration the current bills, the service on the cars, the profit and loss on the notes that were indorsed that were out."

We, therefore, take the book assets as shown	$52,746.64
Deduct capital investment (capital stock)	30,000.00
	$22,746.64
Deduct estimated current liabilities	2,746.64
Net profit in business	$20,000.00

Witness at pp. 191-2-3-4-5-6 testifies at length on this matter and we submit the effect of his testimony is that the current expense deductions aggregated $2,746.64, which was disposed of as follows: one-half thereof—$1,373.32—is in Boss' account because it belonged to Boss in the dissolution and distribution. The other half was never in Peake's account although it belonged to Peake. Boss says that by agreement this item of $2,746.64 was deducted for current liabilities—that is, for accruing current expenses on the old business.

He claims that in carrying on the old business those current expenses arose because of service on cars that were sold by the Boss & Peake Automobile Company and because of losses on notes taken from automobile purchasers, which notes were discounted, and because of outstanding current bills not presented at the time of the dissolution and distribution.

Mr. Peake's one-half of this sum, $1,373.32, was not credited to Mr. Peake as above shown but later, and after Boss and McRell conducted the business for one month, they saw that the $2,746.64 current expense deduction so set aside was insufficient to pay such obligations. That is, was insufficient to pay the accruing contingent current expenses of the old unfinished business of Boss & Peake Automobile Company.

Thereupon the account was closed by crediting Peake's one-half of that $2,746.64 fund ($1,373.32) as follows:

To Boss	$996.21	
To McRell	377.11	$1,373.32

And thereafter the C. L. Boss Automobile Company (the partnership composed of Boss and McRell) absorbed the excess loss of the Boss & Peake Automobile Company (the corporation) arising from these current accruing losses on the unfinished old business of Boss & Peake Automobile Company.

The ultimate disposition, therefore, of the $2,746.64 current expense item was as follows:

(a)	To C. L. Boss in the dissolution and distribution agreement— one-half of said sum or		$1,373.32
(b)	Mr. Peake's one-half was ultimately credited,		
	To C. L. Boss	$996.21	
	To R. J. McRell	377.11	1,373.32
			$2,746.64

Our belief that Judge Wolverton misunderstood this item is supported by his opinion at 285 Fed. p. 415, reference to which with the ensuing pages sustains our position as we submit.

At 285 Fed. 415 Judge Wolverton says:

"The books and records of the Boss & Peake Automobile Company show that on June 1st the company gave to C. L. Boss its check for $8,537.15. This was one of the checks deposited in the bank to the account of Boss, to enable him to draw the check of $26,137,15 to the order of Peake. The book entries in the combined cash and journal show the following:

E. W. A. Peake, Cap a/c	$15,000.00		
do Sal'y a/c		$ 1,079.17	
do for mahogany desk and chairs.....		57.98	
do as earnings 11/25 to 5/31.....	10,000.00		
C. L. Boss, by check, Cap. a/c.....			$26,137.15"

With all due respect for the lower court—and we yield to none in our personal esteem and high regard for Judge Wolverton—we submit that his statement of Peake's closing entries are out of balance. They should be:

E. W. A. Peake, Cap a/c	$15,000.00		
do Sal'y a/c.	1,079.17		
do for Mah'y desk & chairs	57.98		
do as earnings 11/25 to 5/31	10,000.00		
C. L. Boss, by check, Cap a/c.....			$26.137.15

And likewise, in considering Boss' closing entries on the dissolution and distribution agreement, Judge Wolverton says:

> "In the journal is found this entry:
>
> | | | |
> |---|---|---|
> | Profit & L. | $10,000.00 | |
> | do | 11,373.32 | |
> | Interest per agreement E. | | |
> | W. A. Peake | | 10,000.00 |
> | C. L. Boss, 1/2 profits | | 11,373.32 |
>
> The evidence shows that a balance of $1,373.32 was passed to surplus account. It is further shown that the profits of the company on June 1st were $22,746.64. * * *"

It is true that the book entry indicates the $1,373.32—which was Boss' one-half of the estimated accruing current expenses of the old business—is shown as a distribution of a profit, but when it is remembered that Boss claims that he agreed with Peake to take $2,746.64 as an accruing current expense fund on the old business and to liquidate the accruing unknown expenses of such old business for items indicated above, then this $1,373,32 is shown not to have been a profit as it was all absorbed and so was Peake's half of the $2,746.64 item ($1,373.32) also absorbed because the accruing current expenses of the old business were greater than the entire sum of $2,746.64 set aside for that purpose.

We submit a careful reading of the opinion discloses that this misconception of this item greatly influenced Judge Wolverton in his decision.

Referring again to 285 Fed. 415, it appears that Peake received payments as follows:

(a)	Capital stock	$15,000.00
(b)	Salary	1,079,17
(c)	For desk and chair	57.98
(d)	As earnings 11/25 to 5/31	10,000.00
	Total	$26,137.15

The excess received over his capital and his earnings is $1,137.15.

Now refer to Boss' closing account on the same page and we find this:

Profit & L	$10,000.00
do	11,373.32
And against this the credit as follows:	
Interest per agreement E. W. A. Peake	$10,000.00
C. L. Boss, 1/2 profits	11,373.32

It would appear, therefore, that the lower court was misled by the fact that Peake got $10,000 only as his share of the profits whereas he regarded Boss as receiving $11,373.32 as Boss' share of the profits, whereas, in truth and in fact, the $1,373,32 received

by Boss at that time was one-half of the estimated current expense fund, as above shown.

II.

CLEARING ACCOUNT

The court says (285 Fed. 415):

> "Other entries that throw some light upon the subject of controversy are: One in the ledger showing that the surplus account of $1,373,32 was passed, to C. L. Boss $996,21, and to R. J. McRell $377.11; and two in the combined cash and journal, of date June 19, 1917, the first a charge, 'Clearing a/c, $4,223.91,' evidenced by check No. 2804; and the second, 'Clearing a/c Tr. from B. & P. A. Co., to C. L. B. & Co. $4,223.91.' The books of the Boss & Peake Automobile Company were not closed on June 1st, but were used by the C. L. Boss Automobile Company, and carried on as though there had been no suspension of business on the part of the corporation."

Concerning this clearing account the records show witness Boss' cross-examination, pp. 203-4 and at pp. 205, at seq the witness says:

> (p. 205) "Q. That occurs in this combined cash and journal of the day preceding the entries relating to the charge to Mr. Peake of $10,000 and $15,000 and salary, to which you referred in your direct testimony, doesn't it?

A. The entry is entered the day previous.

Q. That is the entry of this charge against you and on account of the check given by the corporation is entered the day previous to these other transactions?

A. The transaction—

Q. Answer the question first, and then explain.

A. Yes, sir. The transaction was made the same day. Momentary occupation of the bookkeeper caused him to enter the other transaction a day later than when it took place.

Q. How do you know what momentary transactions the bookkeeper had?

A. Because it was carried into the balance as May 31st, part of the next day's transaction. The next day's transaction, the original entry of the salaries was entered a day too late. May 31st it was placed back in the final balance as of May 31st, and the books show it was entered June 2nd.

Q. Now, Mr. Boss, you were unable to explain to us a moment ago this clearing item, what that sum represented?

A. Yes.

Q. I called your attention to page 136, which is marked Peake's Exhibit 'D'. Now, let me call your attention to page 135 of the same

book, where this same item appears, and opposite it is found check No. 2804. Now can you tell us what that is?

A. No. I cannot. I don't see anything here that would say what is was for.

Q. It shows that check was written for the amount?

A. No.

Q. Doesn't it, isn't there the check number?

A. No; no.

Q. What is that column headed?

A. Yes, that is check number, yes.

Q. That shows that check was issued for that amount, does it not?

A. Yes, it would indicate that, yes.

Q. And page 136 shows that it was issued to the C. L. Boss Automobile Company from Boss & Peake Automobile Company, does it not?

A. That shows that it was charged to C. L. Boss Automobile Company.

Q. And shows that it came from Boss & Peake Automobile Company, does it not?

A. It indicates that from the bookkeeping here, yes, sir."

(Document introduced in evidence.)

Witness continues (p. 219):

"Q. Now, will you please turn to pages 135 and 136 of that combined cash and journal and refer to this item $4223.91, being check numbered 2804, and state whether one of those entries is a debit and the other a credit—if so, state which is the debit and which is the credit—of the same item?

A. One is a credit and one is a debit.

Q. Which page is the credit and which is the debit?

A. The debit is 135 and the credit is 136.

Q. In winding up the old affairs of the Boss & Peake Automobile Company, and transferring the business and the assets over to C. L. Boss Automobile Company, were you doing that at the time and through the time that these entries were made in that part of June?

A. We were doing it continuously until all the old affairs were wound up. We might have had a note or something of that kind which would run for a long time; that is, an automobile might be sold on a note that we would have to take up. It would be a note indorsed by the Boss & Peake Automobile Company, and we would have to take it up. The date that all these old affairs were settled was indefinite; it was continued.

Q. Did you have to handle items as they came up from day to day, from time to time?
(220)

A. Yes, sir."

Witness Weldy (Government witness) testifies at pp. 238, et seq concerning this matter and at pp. 239-240-241 he says:

"Q. Will you turn to page 136 of this journal, combined cash and journal, pages 135 and 136. I want to call your attention particularly to this check No. 2804 for $4,223.91, that is marked clearing account, and on page 136 the same item appearing under the 19th as a clearing account transferred from B. & P. A. Company to C. L. B. & Company, $4,223.91. I will ask you whether one of those items is a debit item and the other a credit.

A. They are.

Q. Which is the debit and which is the credit, Mr. Weldy?

A. The first item on page 135 is debit and on page 136 credit.

Q. From your experience in investigating corporate records and as an accountant, what is this account referring to when it says a clearing account?

A. That is hard to tell. It is usually the dumping ground for a number of things, to

close up the books at a certain period, or in between periods; and when we find that there is a debit and a credit closing the account we very seldom go into it.

Q. In examining the books of the Boss & Peake Automobile Company, in what condition did you find them?

Mr. Maguire: I don't see that that would be competent.

Court: Do you object to that?

Mr. Maguire: Yes, your Honor, I do.

Court: I think he has already testified.

Mr. Logan: I don't know that he has answered that question, your Honor.

Court: No, not that question, but I understood him to say he found them in very good form at some stage of his testimony.

Mr. Logan: I don't recall that, your Honor.

A. I think I did. I think I made that statement, your Honor, yes, sir.

Cross-examination resumed.

Q. In this matter of clearing account, Mr. Weldy, that shows that there was a check written, doesn't it?

A. Yes, sir.

Q. It doesn't show what the check was written to, does it?

A. No.

Q. But when you turn over the page here, that explains the transaction, doesn't it?

A. Yes, it appears so. There is more explanation of the credit than there is of the debit.

Q. Now, I want to ask this question: Isn't that where they had taken the money out of the bank account of Boss & Peake Automobile Company and put it over there to the bank account of C. L. Boss Automobile Company?

A. I would not attempt to say it was. That is up to the bookkeeper.

Court: I want to ask a question. Why does one of those entries appear on the debit side and one on the credit side?

A. I think, your Honor, just as it states there, it is a clearing account for a number of items that have probably come up during the closing of the corporate period, corporate existence. They frequently come up, and then they issue a check to cover it or close it out in some other way. Now, the bookkeeper is the only one that can answer that. I am not competent.

Q. But when you have a clearing account that is a matter of clearing off the books, that does not involve any issuance of any checks, does it?

A. Oh, it might; it might.

Q. You didn't investigate that to trace down the history of that?

A. No, I didn't.

Q. Very well, sir, I won't further examine you, then."

Mr. Murphy, the bookkeeper, testifies concerning this same account at page 327.

"Q. Now, Mr. Murphy, I want to call your attention to the combined cashbook and journal for the month of June, being page 135, and to an entry appearing therein under date of June 19, 1917, and particularly to check 2804, $4223.91, bearing this legend 'Clearing account.' Will you explain to the Court what that transaction was, and when it took place?

A. That was the date of the transfer, and represented the balance in the bank of the Boss & Peake Automobile Company, which at that date was being deposited to the C. L. Boss Automobile Company.

Q. The C. L. Boss Automobile Company was the partnership of Boss and McRell?

A. Yes.

Q. Now, will you state whether or not prior to the 19th of June the funds of the business were deposited and kept in the Boss & Peake Automobile Company bank account?

A. Yes, up to June 19th."

There is no evidence showing that this $4223.91 arose from the old business. The old books of the Boss & Peake Automobile Company were used by the C. L. Boss Automobile Company in carrying on its new business—as well as in the closing of the old affairs of Boss & Peake Automobile Company.

The bank account of the C. L. Boss Automobile Company (the Boss-McRell partnership) was carried at the First National Bank of Portland in the name of the Boss & Peake Automobile Company until June 19, 1917.

Keeping in mind that the month of June is a period of the year when automobiles show an increased purchase and use in the Pacific Northwest and that the partnership of Boss & McRell was in operation from June 1 to June 19, this $4223.91 is easily accounted for as coming from the business of the C. L. Boss Automobile Company.

The evidence is conclusive that C. L. Boss Automobile Company (copartnership between Boss and McRell) filed its affidavit of assumed name, as required by law, on June 1, 1917, and from that time it transacted the new business. It is further beyond dispute that the only business of the old corporation—that is Boss & Peake Automobile Company, transacted after May 31, 1917, related to the accru-

ing, unsettled, contingent liabilities, as above shown, and that the C. L. Boss Automobile Company (the copartnership) continued using the old books of the Boss & Peake Automobile Company.

Mr. Murphy, bookkeeper, testifies at p. 329:

"Q. Now, Mr. Murphy, was there any change at all made in the manner in which the business was carried on and the books were kept, between the operations of the Boss & Peake Automobile Company and the C. L. Boss Automobile Company?

A. No.

Q. Did you have any instructions to make any changes in the method of keeping books or the manner of transacting the business on June 1st, or immediately thereafter?

A. No."

In the light of this testimony we submit there is no adverse criticism of Boss' business, predicated upon this clearing account.

III.

COPARTNERSHIP USED THE CORPORATION'S OLD BOOKS

The opinion says (285 Fed. 415):

"The books of the Boss & Peake Automobile

> Company were not closed on June 1st, but were used by the C. L. Boss Automobile Company and carried on as though there had been no suspension in the business on the part of the corporation."

Boss' testimony hereafter quoted shows that in the dissolution and distribution between him and Mr. Peake, it was agreed that Boss should take the other assets of the company and hence these books were his after the transaction with Mr. Peake. They became his by reason of the dissolution and distribution between him and Mr. Peake.

The old business of the Boss & Peake Automobile Company ended, except that the books had to be used to get the assets which Boss received in the dissolution and distribution and to get the proper proportion of the accruing current expense fund of $2,746.64, properly chargeable to Boss and McRell, respectively.

It seems that the form of bookkeeping has confused his Honor, Judge Wolverton, whereas, as we shall hereafter show, the courts regard the substance and not the form of the bookkeeping.

IV.

At 285 Fed. p. 418 the court says:

> "It is a matter of moment, also, that the stock had a value beyond the mere book value

of the assets of the corporation. The enterprise had proven to be profitable. On an investment of $30,000, the company had earned more than $22,000 in five months, and the good will must have been of considerable worth. Peake gave up his interest in this when he parted with his stock."

We respectfully submit that Peake's testimony at pp. 287 to 309 shows his intimate acquaintanceship with the value of the business, with its profit-making power and with each item of its affairs.

Concerning the value of this good will Peake states as follows (p. 308):

(Referring to the time of the conversation at the depot on May 21, 1917) "Q. At that time you had in mind the condition of the business, didn't you?

A. I had a general knowledge of the business, yes.

Q. What else did you take into consideration in fixing the value of your stock, other than its original capital value and the $10,000 dividends?

A. Well, it was a pretty good business, making about $5,000 a month.

Q. How much?

A. About $5,000 a month at that time; between $4,000 and $5,000.

Q. And you charged nothing for that?

A. I didn't get very much for it, no."

Although this testimony of Peake's admits that he had this alleged good will in mind when he fixed his sale price as he claims, at the depot on May 21, 1917, yet the lower court seems to regard this good will as having some remarkable value over and above the price paid Peake in the dissolution and distribution agreement.

Now concerning this alleged value of this pretended good will we submit that the record is conclusive on the following facts:

(a) When Boss and Peake formed the Boss & Peake Automobile Company (the corporation) each subscribed and paid in cash for $15,000 of the par value of the stock, making their capital investment $30,000.

(b) At that time it was understood that Peake was to be, and throughout their relations in the corporation he did sustain the position of the financial man.

(c) At the organization of the corporation (Boss & Peake Automobile Company) it was understood that Boss was to be the salesman or the executive head of the business.

(d) Boss had the Hudson contract in his old partnership before the corporation was formed.

(e) Boss took the Hudson contract and Boss' ability as a salesman into the corporation.

(f) The ability to sell the automobiles was that of Mr. Boss and not that of Mr. Peake and the right to sell the Hudson cars was a franchise which was not transferable or assignable in the commercial world.

(g) Boss claims that the Hudson contract has no commercial value as such; that the contract is not negotiable; that it is a right only; and that the value of that contract depends upon the ability of the salesman who handles it; that the contract itself has no assignable or transferable commercial value.

(h) When Boss went into the corporation he paid cash for his stock and so did Peake. Mr. Boss was not allowed a thing for the good will of the Hudson contract nor for its alleged pretended commercial value. It had no such value then and neither did it have any such value six months later when he and Peake quit.

(i) Peake did not take any good will into the Boss & Peake Automobile Company—he took financial ability and cash—and when the dissolution and distribution took place Boss took his salesman ability and the Hudson contract and Peake took his money and his profits and they parted company.

(j) And on this same June 1, 1917, when Boss made the payment to Peake, Mr. Boss immediately went to Mr. Logan's office and there he and Mr. McRell made the affidavit of assumed name of C. L. Boss Automobile Company—the partnership between Boss and McRell—and that partnership entered upon the business of selling Hudson automobiles.

(k) Furthermore, in the talk at the depot on May 21, 1917, between Mr. McCornack, representative of the Hudson Motor Car Company, and Mr. Peake and Mr. Boss, Mr. McCornack told Mr. Peake that as between him and Boss the company chose Boss. This Hudson contract was a bone of contention between Boss and Peake. Peake tried to deprive Boss of the contract knowing that if the contract was cancelled the pretended good will of the Boss & Peake Automobile Company went with it.

(l) Peake knew that the Hudson Company chose Boss instead of him. That company thereby notified Peake that the Boss & Peake Automobile Company had no good will in that Hudson contract —hence, Peake's testimony as above quoted.

(m) This case was called for trial May 22, 1922, at 2 p. m., and its trial was continued May 23rd and 24th (Tr. p. 73).

(n) During the trial a fatal illness occurred in the family of Mr. Logan and the case was adjourned on May 24th, 1917 (Tr. p. 73, also 322), and was resumed again on July 7th, 1922, at 10 a. m. (Tr. p. 73, also 322).

(o) From May 24th to July 7th is approximately six weeks. Boss' testimony had been given. His claim that the Hudson contract had no assignable commercial value—that its value depended upon the ability of the salesman—was well known, and, although Mr. Peake and his attorneys had six weeks' time to rebut Boss' testimony, there is not a single automobile man of any standing that was called to the stand to dispute what he said on that point.

(p) As illustrative that the good will of the automobile business depended upon Boss' ability as a salesman and the mere franchise from the corporation, let us suppose that at the dissolution and distribution Mr. Boss had withdrawn and Mr. Peake had tried to continue in business with McRell—as McRell says he did want to do; it is settled that the Hudson Motor Car Company representative (Mr. McCornack) told Peake that the company chose Boss as against him, and thereupon Peake and Boss had the conversation immediately at the depot in Portland.

If Boss had retired he would have taken that

contract and his own salesman ability with him and how much good will would there have been left for Peake and McRell in their partnership which Peake clandestinely attempted to form with McRell some time in the early part of the year?

(q) Again let us suppose that the dissension between Boss and Peake had resulted in a receivership for the Boss & Peake Automobile Company. Suppose that Boss had severed his connection with the company and started in the automobile business alone.

As between Boss, individually, and the receiver of the Boss & Peake Automobile Company, is it not plain that the Hudson Motor Car Company would have cancelled the Boss & Peake Automobile Company contract and made a new contract with Boss, and such contract being the alleged good will, would leave nothing known as good will in the company.

We respectfully submit that the alleged good will arising from the Hudson contract and Boss' salesmanship was not property that could or would pass either to a receiver or that could or would be assignable in a mercantile transaction and that the lower court was confused by attributing considerable worth to the alleged good will of the business conducted by the Boss & Peake Automobile Company.

In view of these facts we respectfully urge that the lower court's remarks imputing a value to this good will are beyond the record.

The question of good will, with the other matters above pointed out, seem to enter largely in the court's consideration of the merits of this case and we respectfully submit that they influenced his judgment erroneously as we claim and as we shall hereafter attempt to show.

V.

The court below further says (285 Fed. 420):

> "Another circumstance is that Boss borrowed $8,537.15 from the corporation on his note, and with this paid Peake, in part, the consideration for which he sold his stock."

We respectfully submit that there is no evidence whatsoever sustaining this statement. Mr. Boss never gave his note to the Boss & Peake Automobile Company for any sum whatsoever.

In raising the money with which to pay Peake the $26,137.15 Boss raised it in the following manner:

(a)	He borrowed from the Western Bond & Mortgage Company and gave his note and mortgage therfor;	$ 8,000.00
(b)	Peake loaned, as the evidence shows	9,600.00
(c)	Boss took check from the Boss & Peake Automobile Company	8,537.15
		$26,137.15

We direct opposing counsel's attention to this misstatement in the opinion and ask them to say whether they will defend the Judge's statement that Boss gave his note to the Boss & Peake Automobile Company.

The facts are stated by Boss in telling of the agreement made between him and Peake at the depot as follows:

(Tr. pp. 127-8-9)

"Q. Tell how that came up, and tell us all about the conversation with him then at the time he refers to.

A. Mr. McCornack, the Field Manager of the Hudson Motor Car Company, made a trip here to the coast, and during Mr. McCornack's trip Mr. Peake came to the depot and met Mr. McCornack in the presence of Mr. McRell and myself. And while there at the depot Mr. Peake made overtures to Mr. McCornack to get the

Hudson contract, and Mr. McCornack asked Mr. Peake what he did in the business; and after Mr. Peake had explained, he said, 'I understood you to be a financial man, and as a financial man I think your time would be worth more than what you have done in the business.' And Mr. Peake made representations, and Mr. McCornack said that if Mr. Peake quarreled with me he would not be quarreling with me, he would be quarreling with the Hudson Motor Car Company. After Mr. McCornack left to board the train, I turned to Mr. Peake and I said that I noticed that he was blocking our distribution, our dissolution and distribution again, and he said, 'How so?' I said, 'By taking the cash of the corporation and putting it in notes that the bank was carrying'; and Mr. Peake said, 'I will take notes, title notes on all the new Hudson cars, so that the distribution and dissolution can be completed. I will take the physical assets. I will take the automobiles of the corporation, and sell them to you boys, and take the title notes, and loan you boys the money on the very automobiles so that the dissolution and distribution can be completed.'

Q. At that time what other thing was said, if any, as to how you would arrive at what sum he should be paid?

A. Mr. Peake said, 'In doing so I must have my salary; I must have my capital, and I must have my net profit, which I estimate—the

net profit I estimate to be $20,000 after allowing over $2,000 for profit and loss on the notes that were indorsed, the service on the cars that were out, and the incidental bills that were not in. Experience had taught us by keeping record of the business constantly—

Mr. Reilly: Objected to, as the voluntary statement of the witness is not responsive to the question; merely argumentative; not a statement of any fact.

Court: Just answer the question.

Q. You state, Mr. Boss, that he asked for his salary, his capital and his net profits.

A. His estimated net profits.

Q. You have already told about the cars. Now what about this salary. How was that arrived at, and in what way had it been carried on the books, if at all?

A. Mr. Peake had had Mr. Murphy credit himself and myself a salary.

Q. How much?

Court: Who was Mr. Murphy?

A. Our bookkeeper. It was not authorized by the corporation; had never been authorized; and I wanted to draw my salary, and because it was not authorized by the corporation I felt as if I could not draw it."

And again at p. 130:

Q. Did you agree to that with him, to allow the salary?

A. At the depot.

Q. At the depot; in this settlement and distribution?

A. His proposition that he put forth was accepted; and at the time that it was put forth I said, 'As of June 1st.' This was May 21st.

Q. 31st, wasn't it?

A. No, the proposition made at the depot was May 21st; either May 21st, May 22nd, or May 23rd; and in checking back and looking at the calendar I think it was May 21st.

Q. Anyway, you accepted the proposition that he made?

A. Yes, sir."

And from pages 129 to 144 Mr. Boss testifies in extenso concerning the agreement at the depot and at page 144 he says:

"Q. Now, you stated what Mr. Peake took in this dissolution and distribution. What became of the balance of the assets of the Boss & Peake Automobile Company? Who got that?

A. The division would go to me; and I would have the liabilities and the assets of what was left after he had his capital, his net profits, and his salary. I would have mine in the stock and the accounts and the liabilities.

Q. What do you mean, stock in trade?

A. In merchandise."

Boss' version of the affair is corroborated strongly by Mr. McRell, and, while it is true that Peake disputes their version, yet the lower court found with Mr. Boss on the transaction at the depot because the court says (285 Fed. 416):

> "Boss and McRell agree in all material particulars as to the understanding reached at the depot. Peake discloses an entirely different arrangement. Standing alone, and according to the witnesses full credibility, Boss would have the preponderance of the evidence in his favor."

Here, then, the court finds that so far as the conversation at the depot is concerned—that is the acual agreement made between the parties—the evidence preponderates in Boss' favor.

The evidence shows that Peake took:

(a) The 8 new Hudson automobiles;
(b) His capital investment of $15,000;
(c) His one-half estimated profits—$10,000;
(d) His back salary—$1079.17, and
(e) The value of his mahogany desk and chairs—$57.98.

The evidence also shows that the remainder of the assets fell in the distribution to Mr. Boss.

This means then that of the physical assets Peake took the automobiles and Boss took the cash and that the $8,537.15 cash which Boss took from the Boss & Peake Automobile Company account was his by reason of the dissolution and distribution.

He never gave any note for it and the court's statement that he did give a note for it aptly illustrates the misconception of this case which his Honor had.

VI.

THE EIGHT AUTOMOBILES

At the time of the dissolution and distribution the Boss & Peake Automobile Company had eight new Hudson cars.

Boss testifies that at the conversation at the depot it was agreed Peake should take these cars. He is corroborated by McRell and contradicted by Peake, but the lower court found that the evidence on the conversation at the depot preponderated in Boss' favor. Boss' testimony concerning these eight automobiles is found in the record at pp. 128 to 144, et seq., and on cross-examination he adhered to his statements.

He says that in the dissolution and distribution agreed upon on May 21st or 22nd, 1917, Peake actu-

ally took the eight new Hudson automobiles, etc., and that he (Boss) would get the remainder of the assets as heretofore shown.

We cite this testimony now to show that Peake did actually take the physical assets of the company.

VII.

EQUAL DIVISION OF ASSETS

The opinion says (285 Fed. 417):

> "There was never an inventory of the assets made, and, of course, Peake never had any knowledge of such, nor any hand or part in it. * * * (below the middle of page). Nor was there an equal division of such assets. There was never an inventory made up of the entire assets, brought down to the date of the culmination of the transaction, and the parties did not deal with reference thereto when they closed their negotiations."

While it may be that no formal inventory was ever made, yet, as we submit, the record discloses that Peake knew intimately the whole affairs of the corporation. His testimony on cross-examination from pp. 287 to 322 shows:

> "Q. Did you have any talk with Mr. Boss about your getting out of the corporation?

A. Why, yes, away back in March.

Q. Did you have any other conversation with him between March of 1917 and June 1, 1917, about your getting out of the corporation?

A. Nothing to amount to anything, only asking when he would be able to be in a position to buy.

Q. You asked him when he would be in a position to buy?

A. Yes.

Q. Did he tell you the condition of his finances?

A. Possibly. I don't particularly remember.

Q. During that time, between March, 1917, and June, 1, 1917, you had full access to the books of your own corporation, didn't you?

A. Yes.

Q. Have any trial balances?

A. Yes, Mr. Murphy got out a trial balance.

Q. How many trial balances did you have?

A. I do not know.

Q. Several, didn't you?

A. I wouldn't even say that, I think there were several.

Q. Several?

A. Yes.

Q. How frequently did Mr. Murphy give you trial balances?

A. That I couldn't tell you.

Q. When he got out those trial balances, didn't he give a copy to you for your desk, and one to Mr. Boss for him, for his information?

A. No, sir."

Witness then tells about the trial balances (p. 290); that he looked over them and that either he or Boss could refer to the trial balance if they wished; and says:

"Q. Did you talk with Mr. Boss about how affairs were getting on?

A. We were always well satisfied as to the money-making part of the business.

Q. Both you and Mr. Boss were well posted as to the condition of the business?

A. Fairly well posted, I think.

Q. You knew the latter part of May, 1917, you knew about what you had made, didn't you? You knew the profits?

A. In a general way.

Q. What were they?

A. Well, I know now. I didn't know at the time.

Q. Oh! You examined those trial balances, and you didn't know what profits you were making? Is that right?

A. Yes, because the trial balance had not been made out in June or May.

Q. When was it made before that?

A. It might have been made in—I don't know; it wasn't made at the time I went out.

Q. Didn't you say a moment ago that you had several trial balances between March and June?

A. Between March and June?

Q. Yes.

A. No; from the time I went in.

Q. From the time you went in?

A. Yes.

Q. How many trial balances did you have from November, 1916 up to June 1, 1917?

A. I do not know.

Q. Did you have more than one?

A. I would fancy all I could remember would be two or three.

Q. Did you have one every month?

A. I do not think so.

Q. When will you say you got those two or three trial balances?

A. I don't know.

Q. But you did have two or three?

A. Yes, there were two or three made out.

Q. How near to June 1, 1917, did you have a trial balance made?

A. That would be impossible for me to say. I don't know. Mr. Boss has the trial balances; he should produce them.

Q. Did you, in addition to the trial balances, have access to the books?

A. Certainly.

Q. You knew about how the sales accounts were going?

A. Yes.

Q. And you knew that in your books you had a separate record of each car that was sold, showing specifically the items of expense, the first cost, to whom sold, the amount received, and the profit, didn't you?

A. Yes.

Q. So you knew about what the profits were?

A. In a very general way.

Q. Well, what were they? What was your knowledge?

A. My knowledge is not very definite. I had an idea what the business was doing. That was all."

It is, therefore, plain that Peake had the affairs of the business fairly in mind at all times. In fact, the court in its opinion says (285 Fed. 412):

"The parties were business men, were keenly alive to the promotion of the enterprise, and kept fairly in mind the probable earnings of their investment as the business proceeded."

This being true, it seems hardly material that there was not a technical inventory made at the time of the dissolution and distribution.

Both Mr. Boss and Mr. Peake had equal access to the books, Peake was the financial man and his business training would make him study the financial condition closer than Boss would study it, so that when the question came up on the division of the affairs Peake, having been informed by Mr. McCornack that the Hudson Motor Car Company preferred Boss to him, made the proposition at the depot for dissolution and distribution as Boss outlined in his testimony, which Boss immediately accepted.

The assets of the corporation, as shown by the books, were at that time $52,746.64. This sum was made up as follows:

(a) Capital investment	$30,000.00
(b) Profits	22,746.64
	$52,746.64

And the profits—so-called—$22,746.64—were again separated so that the fund for payment of accruing current expenses of the old business—$2,746.64—was deducted from the $22,746.64, so-called profits, leaving the unquestioned net profit of $20,000 to be divided equally between Boss and Peake.

As the parties themselves made this settlement upon this basis at the depot and because the testimony preponderates in Boss' favor, as the lower court held, respecting the conversation at the depot, the question of whether there was an exact equal division of the assets and profits becomes academical.

VIII.

Peake's Transactions of May 31, 1917

At 285 Fed. 414, the court says:

> "On May 31, 1917, Peake tendered to the board of directors and stockholders of the Boss & Peake Automobile Company his resignation as secretary and treasurer and director of such

company. On the same day, at a stockholders' meeting, at which were present C. L. Boss, representing 298 shares; R. J. McRell, 1 share, and R. E. Murphy, 1 share, his resignation was accepted, and McRell was elected director in his stead. On June 1, 1917, Boss and McRell filed with the county clerk and ex-officio recorder of Multnomah County a certificate declaring that they had entered into co-partnership under the assumed name of C. L. Boss Automobile Company."

We believe the court is mistaken on this date. It is true Peake's resignation was dated May 31st —that his transfer of the stock purports to have been made on May 31st—that the documents signed purport to have been executed May 31st, but all the witnesses agree that Peake turned over these documents at the First National Bank on June 1st. Peake testifies as follows (Tr. pp. 303-4):

"Q. When was it you gave the stock over to Mr. Boss?

A. I gave it to him at the time he gave me the check.

Q. At the same place?

A. Yes.

Q. In the First National Bank of Portland?

A. Yes.

Q. When was your resignation as an officer of the Boss & Peake Automobile Company written out, do you know?

A. Well, my impression is that it was made and given to him at the same time he got the stock.

Q. I will show you now this document—the pages are unnumbered—it is in the record book of the Boss & Peake Automobile Company; purports to be.

Mr. Reilly: It is part of the sheets introduced in evidence.

Mr. Smith: All right.

Q. Purporting to be your resignation. Is that right?

A. Yes.

Q. What is the date of it, please?

A. May 31st.

Q. May 31 is written in typewriting above, isn't it?

A. Yes.

Q. It is also written in pen down here at the bottom, where the blank was left to fill in the correct date with the pen, wasn't it?

A. Yes.

Court: Both those dates are May 31st, are they?

Mr. Smith: Yes, your Honor; typewritten one at the top, and one at the bottom is May 31st also.

Court: That was prior to this transaction at the bank?

Mr. Smith: The day before.

A. Well, I prepared my resignation that day, and delivered it to Mr. Boss at the bank."

And his further testimony at pp. 305-6, et seq, sustains this statement.

Boss testifies at pp. 143-4:

"Q. Now, on this same day of June 1st, 1917, what transaction, if any, did you have with Mr. Peake about a $9,600 advance from him to C. L. Boss Automobile Company?

A. In following out this offer and the acceptance of the offer to dissolve and distribute, he took all the new Hudson automobiles.

Q. How many in number?

A. Eight; and took title notes on them; * * * (p. 144).

* * *

And then following that time I walked right over to Mr. Logan's office with Mr. McRell and signed that statement of the C. L. Boss Automobile Company under assumed name at that very minute."

ASSIGNMENTS OF ERROR

Upon this appeal the appellant relies upon the errors designated in the transcript at pp. 61-3, to-wit:

I.

The court erred in holding and deciding that C. L. Boss was responsible to and should be decreed and was decreed to pay to the plaintiff the remaining unpaid portion of the tax involved in this controversy with interest and penalties, and in decreeing that the said C. L. Boss be required to pay to the plaintiff any sum whatsoever of the amount involved herein.

II.

The court erred in not holding and deciding that the defendant E. W. A. Peake was and is responsible to the plaintiff, and as between him and C. L. Boss the said E. W. A. Peake was and is responsible and should be decreed to pay the remaining unpaid portion of the tax, with interest and penalties, involved in this case.

III.

The court erred in not holding and deciding that C. L. Boss should be absolved and freed from any and all claims of the government involved in this controversy.

IV.

The court erred in rendering decree against the said C. L. Boss for any sum whatsoever and in not rendering decree against the said E. W. A. Peake as prayed for in Boss' pleadings, upon the ground that the evidence introduced upon the trial entitled the plaintiff to recover from the said E. W. A. Peake and as between E. W. A. Peake and C. L. Boss entitled such recovery by plaintiff against E. W. A. Peake alone.

V

The lower court committed error upon the whole record in holding that C. L. Boss was not entitled to the relief sought for in his pleadings.

VI.

The lower court committed error upon the whole record in dismissing the bill as to the said E. W. A. Peake, and in holding and deciding that the transaction between Boss and Peake was a sale of Peake's stock to Boss and was not a dissolution and distribution agreement.

Appellant relies upon the following

POINTS AND AUTHORITIES

Point I

The income which is subject to taxation in this case is defined as,

> " 'The gain derived from capital, from labor or both combined,' provided it be understood to include profits gained through sale or conversion of capital assets."

Eisner v. Macomber, 252 U. S. 189; 40 S. C. 189; 9 A. L. R. 1590 (note),

is quoted approvingly in,

Merchants Loan & Trust Co. v. Smietanka, 255 U. S. 509; 41 S. C. 386 at 388,

and applied to Act of October 3, 1917, in

LaBelle Iron Works vs. U. S. 256 U. S. 377; 41 S. C. 528 at 530, Points 1-2-3.

Point II

It is upon the "income" falling within the definition last given that the tax in question is levied.

LaBelle Iron Works vs. U. S., 256 U. S. 377, 41 S. C. 528;

and explained generally in Eisner vs. Macomber, supra.

The definition was adopted and applied to the income tax of 1916 in,

Goodrich v. Edwards, 255 U. S. 527; 45 S. C. 391.

This interpretation finds support in,

U. S. v. McHatton (Mont. D. C.), 266 Fed. 602;

Bulletin No. 1-21, Income Tax Rulings, p. 10, relating to dissolution of corporation and distribution of its assets, says:

> "Where a corporation dissolves and distributes all of its assets prior to the time the list carrying an assessment of additional tax against the corporation comes into the hands of the collector, the tax is not collectible upon notice and demand followed by distraint, but may be recovered only by means of a suit instituted against the stockholders or other persons who may have received the corporation's assets, except bona fide purchasers for a valuable consideration and creditors."

Income Tax Rulings Cumulative Bulletin from April 1, 1919, to December 31, 1919, at p. 251, Sec. 250, Art. 1008, says:

> "Collection of Tax by Suit:
>
> If a corporation in process of dissolution does not reserve sufficient funds to pay any income tax assessed against it, the liability for the amount of tax remaining unpaid attaches to the individual stockholders, and if necessary legal proceedings may be instituted against them for collection of the tax."

Point III

The tax follows the income and in case of a dissolved corporation, those who have received the assets of the corporation, either as dividend or otherwise, upon such dissolution, are liable for the income tax pro rata.

(1) The assets of a corporation, if its debts are not paid before dissolution, become a trust fund chargeable with the debts of the corporation.

Wood v. Dummer, 3 Mason 308, Fed. Case No. 17,944.

Mumma v. The Potomac Co., 8 Pet. 281.

Marr v. The Bank of West Tennessee, et al., 4 Cald. 471, 479.

Railroad Co. v. Howard, 7 Wall 392, 410.

Wabash, St. Louis & Pacific Ry. Co. v. Ham, 114 U. S. 587, 594.

Pierce, et al. v. U. S., 41 Sup. Ct. 365.

U. S. v. McHatton, 266 Fed. 602.

People v. National Trust Co., 82 N. Y. 282.

Marshall v. People of State of New York, 41 Sup. Ct. 143.

First National Bank of Houston, et al. v. Ewing, et al., 103 Fed. 168.

(2) The stockholders' liability is several, and may be enforced against one or more of the stockholders to the extent of the distributive share of the corporate assets actually received.

Pierce, et al., v. U. S., 41 Sup. Ct. 365.

U. S. v. McHatton, 266 Fed. 602.

Fidelity Trust Co. v. D. F. McKeithen Lumber Co., 212 Fed. 229.

Garrow, et al., v. Fraser, et ux., 167 Pac. 75.

Martin v. City of Lexington, 210 S. W. 483.

McLeon v. Moore, 145 S. W. 1074.

Hastings v. Drew, 76 N. Y. 9.

4 Thompson on Corporations, 2nd Ed., Sec. 4926.

Fricke v. Augemier, 101 N. E. 329.

Fletcher on Corporations, Vol. 8, p. 9217.

(3) The equity trust fund doctrine which thus permits a creditor to follow the assets of the corporation has been recognized many times in Oregon and was recently applied in,

Gantenbein v. Bowles (decided January 19, 1922), 203 Pac. 614, at p. 619, Point 7.

Point IV

Upon general principles equity disregards the

form and considers only the substance of a transaction, not alone in general business affairs, but in administering this income tax as well.

Eisner v. Macomber, 252 U. S. 189; 41 S. C. 189, at 195, Point 12, says:

> "We have no doubt of the power or duty of a court to look through the form of the corporation and determine the question of the stockholder's right in order to ascertain whether he has received income taxable by Congress without apportionment."

The point that equity will look beyond the devices used to cover the real nature of the transaction and treat it as it really is has been applied by the Oregon Supreme Court in,

Burke v. Hindman, 56 Ore. 545, at p. 550.

ARGUMENT

The transactions at the depot and the agreement there made between Boss and Peake, together with the acts of the parties to the final dissolution of the corporation, support the contention of appellee Boss that the agreement at the Union Station at Portland was one for the dissolution of the corporation and the distribution of its assets.

Because, therefore, both Boss and Peake each

received the actual assets of the Boss & Peake Automobile Company in carrying out the dissolution and distribution agreement, and because the partnership of Boss and McRell, under the name of the C. L. Boss Automobile Company, was formed and became effective as of June 1, 1917, the exact date of closing the contract between Boss and Peake, and because within a few weeks thereafter the Boss & Peake Automobile Company was actually dissolved by legal form, the tax in question, as we submit, should follow the assets so taken as the distributive share of both Boss and Peake equally.

Boss has paid his one-half and Peake, having received his estimated one-half of the division, should be held to pay the other half—that is the unpaid balance due the government as heretofore stated.

Applying the law to these facts, we find these rules laid down by the Federal Supreme Court in

> Eisner v. Macomber, 252 U. S. 189; 40 S. C. 189,

at p. 183, Point 6, the court repeats its former definition of income, and says:

> " 'Income may be defined as the gain derived from capital, from labor, or from both combined,' provided it be understood to include profit gained through a sale or conversion of

capital assets, to which it was applied in the Doyle Case, 247 U. S. 183, 38 Sup. Ct. 467, 469 (62 L. Ed. 1054).

Brief as it is, it indicates the characteristic and distinguishing attribute of income essential for a correct solution of the present controversy. The government, although basing its argument upon the definition as quoted, placed chief emphasis upon the word 'Gain,' which was extended to include a variety of meanings; while the significance of the next three words was either overlooked or misconceived. 'Derived—from—capital'; 'the gain—derived—from—capital,' etc. Here we have the essential matter; not a gain accruing to capital; not a growth or increment of value in the investment; but a gain, a profit, something of exchangeable value, proceeding from the property, severed from the capital, however invested or employed, and coming in, being 'derived' —that is, received or drawn by the recipient (the taxpayer) for his separate use, benefit and disposal—that is income derived from property. Nothing else answers the description.

The same fundamental conception is clearly set forth in the Sixteenth Amendment—'incomes, from whatever source derived'—the essential thought being expressed with a conciseness and lucidity entirely in harmony with the form and style of the Constitution."

At the bottom of the same page the court proceeds (referring to a stockholder):

> "Short of liquidation or until dividend declared, he has no right to withdraw any part of either capital or profits from the common enterprise; on the contrary, his interest pertains not to any part, divisible or indivisible, but to the entire assets, business, and affairs of the company. Nor is it the interest of an owner in the assets themselves, since the corporation has full title, legal and equitable, to the whole. The stockholder has the right to have the assets employed in the enterprise, with the incidental rights mentioned; but, as stockholder, he has no right to withdraw, only the right to persist, subject to the risks of the enterprise, and looking only to dividends for his return. If he desires to dissociate himself from the company he can do so only by disposing of his stock."

In,

Merchants Loan & Trust Co. v. Smietanka, 255 U. S. 509; 41 S. C. 386;

the court reiterates the definition of taxable income and says (p. 389):

> "In determining the definition of the word 'income' thus arrived at, this court has consistently refused to enter into the refinements of lexicographers or economists, and has approved in the definition quoted what it believed to be the commonly understood meaning of the term

which must have been in the minds of the people when they adopted the Sixteenth Amendment to the Constitution. Doyle v. Michell Brothers Co. 247 U. S. 179; 185, 38 Sup. St. 467; 62 L. Ed. 1054; Eisner v. Macomber, 252 U. S. 189, 206, 207; 40 Sup. Ct. 189; 64 L. Ed. 521, 9 A. L. R. 1570. Notwithstanding the full argument heard in this case and in the series of cases now under consideration, we continue entirely satisfied with that definiion, and, since the fund here taxed was the amount realized from the sale of the stock in 1917, less the capital investment as determined by the trustee as of March 1, 1913, it is palpable that it was a 'gain or profit' 'produced by' or 'derived from' that investment, and that it 'proceeded' and was 'severed' or rendered severable from it by the sale for cash, and thereby became that 'realized gain' which has been repeatdly dclared to be taxable income within the meaning of the constitutional amendment and the acts of Congress. Doyle v. Michell Brothers Co. and Eisner v. Macomber, supra."

The court also says (41 Sup. Ct. p. 388):

"There can be no doubt that the word must be given the same meaning and content in the income tax acts of 1916 and 1917 that it had in the Act of 1913."

And then quotes approvingly the definition from Eisner v. Macomber.

In,

Goodrich v. Edwards, 255 U. S. 527; 41 S. C. 391,

(construing the Income Tax Act of 1916) the court says:

"The act under which the assessment was made provides that the net income of a taxable person shall include gains, profits, and income derived from * * * sales or dealings in property, whether real or personal * * * or gains or profits and income derived from any source whatever. 39 Stat. 757; 40 Stat. 300, 307. Section 2 (c) of this same act provides that—

"For the purpose of ascertaining the gain derived from the sale or other disposition of property, real, personal, or mixed, acquired before March first, nineteen hundred and thirteen, the fair market price or value of such property as of March first, nineteen hundred and thirteen, shall be the basis for determining the amount of such gain derived."

And the definition of 'income' approved by this court is:

" 'The gain derived from capital, from labor, or from both combined,' provided it be understood to include profits gained through sale or conversion of capital assets.' Eisner v. Macomber, 252 U. S. 189, 207; 40 Sup. Ct. 189, 193 (64 L. Ed. 521, 9 A. L. R. 1570)."

The District Court in Montana had occasion to apply the law to facts quite similar to those at bar in,

U. S. v. McHatton, 266 Fed 602 (J. Bourquin):

"Although taxes are not debts, and in respect to them the government is not a creditor, both being of higher nature, no reason is perceived why they are not within the principle that those who gratuitously take all a debtor's property, to the extent thereof, may be held to respond for his present debts and obligations, inchoate or vested, or for the damages thereby inflicted—the sometime 'trust fund' doctrine, so far as corporations are concerned.

When defendants took the corporation's property, there was right in plaintiff to thereafter impose further taxes. To pay any such taxes was then an obligation of the corporation. The right was in its nature inchoate; the obligation was contingent. Defendants took subject thereto. The contingency happened; the right vested. The act of September 8, 1916, to this extent takes effect by relation as of the first of the year, and prior to distribution and dissolution.

Accordingly, defendants are liable."

We have shown that the book assets on June 1st were $52,746.64 and consisted of the following items:

(a) Capital investment	$30,000.00
(b) Net profits (estimated)	20,000.00
(c) Accruing current liability fund on old business	2,746.64
	$52,746.64

Now the evidence discloses that of this amount Peake actually received the following:

(a) The par value of his stock	$15,000.00
(b) One-half the estimated net profits	10,000.00
	$25,000.00

And Boss received the other half.

The accruing current liability fund of $2,746.64 has been heretofore explained.

Boss says that in the conversation at the depot Peake stated he must have the eight new automobiles. That conversation was May 21st or 22nd, 1917.

These eight automboiles were worth $9,600, and this sum is strangely coincident and almost commensurate with Peake's one-half of the net profits, which was $10,000.

In other words, Peake took the automobiles as his own until Boss could raise the money to settle with him, and the automobiles which he took, as per his conversation at the depot, were the physical assets of the corporation.

In the cash settlement of June 1, Peake received in money the following items:

(a) Par value of his one-half the capital stock	$15,000.00
(b) Par value of his estimated profits	10,000.00
	$25,000.00

plus,

(c) His salary as officer and the value of his desk and chairs	1,137.15
	$26,137.15

Boss says that he took the rest of the assets, so here, then, is an agreement made on May 21st or 22nd, 1917, that the corporation would be dissolved and the assets divided; the assets were divided as per the understanding reached at that time, and, having been divided, Boss was clearly responsible to the government for his half of the tax, which he has paid, and Peake is just as clearly responsible for the unpaid half, which he refuses to pay.

Of course, as between Boss and the government,

Mr. Boss is liable, but as between Boss and Peake, we submit that under the definitions and the law just quoted, that Mr. Peake is responsible.

Depletion of Assets

Viewed in another light, we say the evidence amply sustains the conclusion that the assets of the Boss & Peake Automobile Company were depleted on June 1st, 1917, because:

(a) Peake and Boss each took $10,000 of the profits.

(b) The transaction involving the eight automobiles, whether viewed in the light of Boss' testimony or of Peake's testimony, shows that Peake knew the assets of the corporation were used to pay him the money, and

(c) In the $26,137.15 deposit, Mr. Peake received the proceeds of a check issued by the corporation for $8,537.15.

Boss says that after the dissolution and distribution the Boss & Peake Automobile Company ceased to do business. Peake admits he had nothing further to do with it and Boss and McRell both say that the C. L. Boss Automobile Company transacted all new business.

Certain it is that these matters must have been

talked over with Mr. Peake as early as May 31st, 1917, because the numerous documents in evidence were executed on that day. The cash payment was not made until June 1st, 1917, but the documents introduced bearing date May 31st, 1917, show that the agreement was made that day and that the final payment was not made until the next day.

Because, therefore, the Boss & Peake Automobile Company ceased to do business and practically dissolved, it follows that those who took the assets of that company are responsible for its debts.

In 14-A-C J 1120,
the author says:

> "Dissolution, however, may be shown if the cessation of business has that result or accompanied by other acts or circumstances indicating a surrender by the corporation of its franchise."

In Ferry v. Latrobe Steel Co. 155 Fed. 161-171, where a corporation had proceeded to sell its property and abandon its corporate business and the directors attempted to subscribe with part of the liquidating funds, to stock in another corporation, the court held:

> (p. 172) "In reply to a part of the defendant's argument, I may add that I do not regard as

important the fact that a formal dissolution of the Steel Company has not yet taken place. Obviously, if the corporation had been actually dissolved, there could be no such question as is raised by the bill; for the power to carry on the corporate business would have ceased and the company's affairs would be in the course of administration by a judicial tribunal, or in some other manner. The controlling facts here are that the company undertook to liquidate and dissolve, that the process of liquidation and distribution has gone so far as to be nearly complete, that the corporate business has been wholly abandoned, *and therefore that the corporate organization—so it seems to me—exists in effect for the mere purpose of dividing the remaining assets among the stockholders, and not for the purpose of taking up again, and using, corporate powers that have been already relinquished.*"

Substantiating our claim of dissolution and distribution, attention is respectfully directed to the transcript at pp. 296 to 303. The pith of these pages of testimony is that Peake admits that he received the following sums in closing the transaction with Boss:

(a) June 1, 1917, check for $26,137.15
(b) The repayment at various times of the eight automobile notes of $1200 each given to E. W. A. Peake by the partnership C. L. Boss Automobile Company at the closing of the transaction.... 9,600.00

$35,737.15

The items aggregating these sums constitute an account which can be rendered in the following form, and the following form only, to be consistent with the truth:

DEBIT		CREDIT	
a. Check	$26,137.15	a. Money loaned (repaid)	$ 9,600.00
Made up as follows:			
1. Money loaned	$9600.00		
2. Check issued by Boss & Peake Automobile Co.	8537.15	b. Capital stock	15,000.00
3. Borrowed from Western Bond & Mortgage	8000.00	c. ½ profit	10.000.00
		d. Salary, desk and chair, less minor deductions	1,137.15
b. 8 notes of $1200 each	9,600.00		$35,737.15
	$35,737.15		

The account as stated above shows the circuitous methods which were adopted in closing the financial side of this transaction.

When it is remembered that Mr. Peake loaned Mr. Boss $9600 on June 1st, 1917, which Boss deposited with the First National Bank as part of the deposit making the $26,137.15 with which he paid

Peake, and that immediately after such deposit Mr. Peake presented Boss' check for the entire $26,137.15 and had it credited to Peake's account in the same bank—First National Bank of Portland—it is seen that the loan of the $9600 and its immediate repayment were simultaneous.

The $26,137.15 item of deposit was made up of the following sums:

(a)	Boss borrowed from the Western Bond & Mortgage Co. and gave his note for it.	$8,000.00
(b)	Boss borrowed from Peake	9,600.00
(c)	Boss took the check of Boss & Peake Automobile Co. for	8,537.15
		$26,137.15

When this deposit was made Mr. Peake was right there at the bank and immediately presented Boss' check for $26,137.15 and had that check credited to his own account.

Peake, therefore, was repaid the $9600 which he loaned Boss at the identical window and at the same moment that the loan was made. The loan and its repayment were, therefore, surplusage in the transaction and the true transaction between Boss and Peake is shown in the following statement of Mr. Peake's account:

DEBIT		CREDIT	
a. His capital stock	$15,000.00	a. Borrowed from Western Bond & Mortgage Company (Tr. p. 66)	$8,000.00
b. His one-half of the profits	10,000.00	b. Check from Boss & Peake Automobile Company	8,537.15
c. His salary, desk and chair, less incidentals	1,137.15	c. 8 automobiles which he took, accepted and he, himself, sold to C. L. Boss Automobile Company, taking title notes on each automobile in the sum of $1200	9,600.00
	$26,137.15		$26,137.15

At pp. 299-300 this phase of the transaction was brought directly to Mr. Peake's notice and he testified:

> Q. Suppose, then Mr. Peake, that instead of loaning Mr. Boss the $9600, you had simply taken a check for $16,537.15?
>
> Mr. Reilly: That is the twenty-six thousand less $9600?
>
> Mr. Smith: Yes, that is the twenty-six thousand less the $9600.
>
> Q. And the automobiles themselves, you would have had the exact amount, wouldn't you?
>
> A. Yes; but I didn't do that."

The entire evidence, therefore, showing as it does that the assets of the corporation were depleted, as outlined above, it follows that those who benefited thereby are liable to the tax; and because Mr. Peake received his portion in the dissolution and distribu-

tion agreement and Mr. Boss received the remainder, it follows that Mr. Peake is liable for his one-half of the after-levied tax and should respond therefor.

We have thus set forth the transaction as it actually took place in the first statement above, showing that Peake actually received $35,737.15, but because he had loaned $9600 of this sum to Mr. Boss, his actual net cash from the transaction was $26,-137.15. Now the form of the transaction involved a loan of $9600 from Peake to Boss and its immediate repayment, but looking to the substance and not the form, we submit that the second statement last above set forth conclusively shows that Peake did take the eight automobiles and in fact his testimony can hardly be construed any other way when we study its effect.

He says at p. 299:

"Q. Each of these eight notes of $1200 was afterwards paid in full to you, wasn't it?

A. Yes.

Q. So that you got the $9600 that they represented, didn't you?

A. Yes.

Q. Then you got the $26,000 on the check, didn't you?

A. Yes.

Q. And the $9600 on the notes?

A. Which I had paid.

Q. You loaned him—

A. Which I had money loaned, yes.

Court: What became of the automobiles?

A. I don't know. The notes were paid. What he did with the automobiles, I don't know.

Court: Were they turned back to him?

A. *They were turned back to him, yes.*

Q. *Anyway, you got your money out of them?*

A. *Yes. I suppose he sold them in the ordinary course of business.*

The inquiry becomes pertinent, namely: how could Peake turn the automobiles back to Boss unless Peake took the automobiles as Boss says?

In,

Eisner v. Macomber, 252 U. S. 189; 41 S. C. 189, at 195, Point 12 says:

"We have no doubt of the power or duty of a court to look through the form of the corporation and determine the question of the stockholder's right in order to ascertain whether he has received income taxable by Congress without apportionment."

The pertinency of that language is palpable on the facts shown.

TRUST FUND DOCTRINE

Viewed in another light the liability of Peake is disclosed under the trust fund doctrine because, as shown above, the agreement at the depot was for a dissolution of the corporaion and a distribution of its assets. This agreement was carried out on June 1st, 1917, and when it was carried out the corporation itself had no assets as such because its corporate powers were abandoned, its business had ceased, it existed in form only for the purpose of dissolution and its former stockholders had all of its assets.

Thereafter, and the following October, the Income Tax Law of October, 1917, was passed and its provision reached the past transactions of the corporation, but because the assets of the corporation had been divided and distributed among its stockholders and the corporation had been dissolved, the Government was compelled to look to those who had received such assets for payment of the corporate obligation, and, hence it has sued both Boss and Peake in this case.

The trust fund doctrine is adopted in and applicable to transactions such as these by the following Oregon cases.

Gantenbein v. Bowles, 206 Pac. 614; 103 Ore. 277 (289, et seq.);
Sabin v. Columbia Fuel Co., 25 Ore. 15;
Garretson Lumber Co. v. Hinkson, 69 Ore. 605.

Having in mind the Income Tax situation in June, 1917, and putting aside after-acquired knowledge, we respectfully submit that equity, looking at the substance and not the form of the transaction, should hold that the dealings between Mr. Boss and Mr. Peake in June, 1917, constituted a dissolution of the corporation and a distribution and division of its assets.

For the reasons stated we respectfully submit the decree should be reversed with directions to enter a decree in favor of the Government and against Peake, or, if the decree of the Government against Boss stands, then giving Boss a judgment against Peake for the amount which Boss must still pay on the unpaid balance to the Government.

Respectfully submitted,

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Attorneys for Appellant Boss.

Service of three copies admitted this —— day of April, 1923.

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Attorneys for Appellee E. W. A. Peake.

Service of three copies admitted this —— day of April, 1923.

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Attorney for Appellee U. S. of America.